APPENDIX

Opinion By the United States Court of Appeals For the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 110, 114—September Term, 1974.

(Argued October 1, 1974 Decided November 4, 1974.)

Docket Nos. 74-1678, 74-1839

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—against—

PHILIP ZANE, JEROME E. SILVERMAN, and ROBERT S. PERSKY,

Defendants-Appellants.

Before:

MEDINA, ANDERSON and MANSFIELD,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Inzer B. Wyatt, *Judge.*

Philip Zane, Jerome E. Silverman and Robert S. Persky appeal from an order denying a motion for a new trial on the ground of newly discovered evidence.

Affirmed.

Appendix

JAMES E. NESLAND, Assistant United States Attorney, New York, N.Y., (Paul J. Curran, United States Attorney for the Southern District of New York, and John D. Gordan III, Assistant United States Attorney, New York, N.Y., on the brief), *for Plaintiff-Appellee.*

SANDOR FRANKEL, New York, N.Y., (Louis Bender, New York, N.Y., on the brief), *for Defendants-Appellants Philip Zane and Jerome E. Silverman.*

JOHN LOGAN O'DONNELL, New York, N.Y., (Charles M. McCaghey, Stephen Schlessinger and Olwine, Connelly, Chase, O'Donnell & Weyher, New York, N.Y., on the brief), *for Defendant-Appellant Robert S. Persky.*

MEDINA, *Circuit Judge:*

On June 13, 1973 Philip Zane, Jerome E. Silverman and Robert S. Persky, two accountants and a lawyer, were convicted after a five-week trial to Judge Wyatt and a jury on one count of a multi-count indictment for filing a false Form 10K Annual Report for Microthermal Applications, Inc. with the SEC. We affirmed 495 F.2d 683, *cert. denied,* 43 U.S.L. Week 3239 (U.S. October 22, 1974). One of the defendants, Akiyoshi Yamada, pleaded guilty to a one-count indictment charging conspiracy to file the false report and he co-operated with the government. He gave extensive testimony implicating Zane, Silverman and Persky not only on the charge of which they were found

guilty but on various other counts on which they were acquitted. Less than four weeks after the conviction of Zane, Silverman and Persky, Yamada came before Judge Cooper on a motion to reduce the sentence imposed on him for the crime to which he had pleaded guilty. In support of this motion five letters purportedly written by persons active in community affairs were submitted by Yamada to Judge Cooper. These letters, which testified to Yamada's good character and praised his work with drug addicts, were written by Yamada himself to influence Judge Cooper. Claiming that proof that Yamada had forged these letters and that he had engaged in such fraudulent and criminal conduct constituted newly discovered evidence, Zane, Silverman and Persky made a motion for a new trial, pursuant to Rule 33, Fed. R. Crim. P. Judge Wyatt denied the motion from the bench remarking that Yamada's credibility had been fully explored at the trial, that the sending of the letters was merely cumulative evidence by way of impeachment and that such proof had no relevance to the issue of the filing of the false report with the SEC. He also found there was no probability that on a new trial with the benefit of the evidence concerning the fraudulent letters a new jury would reach a different conclusion with respect to the guilt of these appellants. This appeal is from the order of Judge Wyatt denying the motion for a new trial.

It requires no more than a brief recital of the law in this Circuit governing the function of the trial judge and that of this Court in connection with Rule 33 motions for a new trial on alleged newly discovered evidence to dispose of this appeal. In the exercise of his discretion the trial judge must determine whether there is a showing: (1) that the evidence could not with due diligence have been

discovered until after the trial; (2) that the evidence is material to the factual issues at the trial and not merely cumulative and impeaching; and (3) that the evidence would probably produce a different result in the event of a new trial. *United States* v. *Birrell*, 482 F.2d 890, 892 (2d Cir. 1973); *United States* v. *DeSapio*, 456 F.2d 644, 647 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972); *United States* v. *Polisi*, 416 F.2d 573, 576-77 (2d Cir. 1969). Less exacting standards, not relevant here, are required in cases involving prosecutorial misconduct or negligence. See, *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973). The function of the Court of Appeals is to decide whether the trial judge has applied these criteria and whether his finding that the application of these criteria required a denial of the motion is or is not clearly erroneous. It is not our function to speculate on the possibility that a jury on a new trial might acquit the defendants. As we conclude that Judge Wyatt applied the proper criteria and that there is no tenable basis for holding that Judge Wyatt abused his discretion, or that his finding in applying the criteria was clearly erroneous, we affirm the order appealed from. It is especially important that this separate consideration of the respective functions of the trial judge and of an appellate court be made in Rule 33 cases involving long complicated trials.

It is obvious that the evidence of the forgery and sending of the letters was cumulative on the issue of credibility and that it had no bearing on the issue of whether or not appellants were guilty of filing the false report with the SEC. Yamada had a lengthy history of involvement in fraudulent securities schemes. Prior to the trial of the appellants, Yamada pleaded guilty to three one-count indictments, one of which concerned the conspiracy to file a false

annual report for Microthermal. In return for co-operation with the government in the prosecution of the appellants, it was understood that the government would not proceed on other criminal offenses committed by Yamada, and also that the government would advise the court of his co-operation at the time of sentencing. At the trial, Yamada was subjected to thorough cross-examination. The basis of Yamada's co-operation, the criminal charges, and his numerous fraudulent securities schemes were brought out to impeach his credibility. In addition, Yamada testified to destroying documents and giving perjurious testimony before the SEC in the course of its investigation into Microthermal.

In support of his finding that the evidence of the forged letters would probably not result in any different decision by the jury on a new trial, Judge Wyatt referred to his recollection of the proofs and his instructions to the jury. We find no reason to disturb a finding based upon such reasoning. We are not persuaded that a new jury would decide the case differently if it knew that Yamada's claim at the first trial that he had reformed and turned over a new leaf was false. Indeed, at the time of the first trial he may have thought he had reformed.

Nevertheless, as we understand their arguments, appellants would have us develop some new law because of what they call the special circumstances of this case. Again and again appellants would have us reverse the decision below because Yamada's testimony at the trial and his forgery of the letters were supposed to be part and parcel of a deep-seated determination to resort to any means to keep out of jail. This is indeed novel doctrine and it would result in new trials whenever after a criminal trial the conduct of a defendant-turned-government-witness indicated a desire to escape the toils of

justice by any form of lying or skulduggery that could be made to appear similar to the alleged giving of false testimony at the trial in the hope of obtaining consideration for his co-operation with the prosecution.

Mesarosh v. *United States*, 352 U.S. 1 (1956), gives no support to the contentions of appellants here. It did not involve a defense motion for a new trial but rather a *sui generis* exercise by the Supreme Court of its supervisory jurisdiction at the instance of representation submitted by the Solicitor General.

The appellants place great emphasis on the fact that the forged and fictitious letters were submitted shortly after the conclusion of the trial resulting in the conviction of the appellants. This fact, however, does not alter the cumulative and impeaching character of these disclosures, nor does it provide an appropriate basis to distinguish this situation from other cases involving Rule 33 motions.

Affirmed.

Oral Opinion of Judge Wyatt

. . . he had not yet been a man reformed, but none of that spoke to his credibility subsequent to making his deal with the SEC, and I only mention that to your Honor as an illustration of why, in my opinion, this is not cumulative impeaching evidence.

The Court: It seems as if we are back to almost a year ago because I can remember Mr. Frankel and Mr. O'Donnell making arguments which were terribly persuasive in making one to decide in accordance with their arguments, but it frequently turned out that I didn't feel able to do so.

I have given this a good deal of consideration and I have read all the papers even the pleadings, and including

the papers submitted this afternoon. However, I do not think I can grant this motion.

There are two motions, but they raise the same point, and that is that the admitted fraud of Yamata on Judge Cooper after his testimony at the trial in our case requires a new trial. But, as I have said a moment ago, the situation here is that Yamata, of course, was not the only witness for the government.

As I have ample cause to remember—but I have not reread the transcript—his credibility was attacked and severely attacked and ably attacked, as was perfectly proper, and he was shown to be an accomplice, an admitted perjurer, and guilty of criminal offenses, and counsel for the defendants are right in saying that as of the time of trial he was saying in substance that he had reformed, and was then telling the truth, where shortly thereafter, he was back committing, in substance, perjury. I understand. Your Points are well made.

But I still believe that since his credibility, as the Court of Appeals said, was thoroughly explored: the jury had before it the various felony charges that had been made against Yamata, the pleas of guilty, his perjury before the SEC, his hopes of leniency, and they were dealt with not only in his testimony but in summation, and I remember in my charge I gave—I have to say "standard" instructions, but I do have a usual formulation as to accomplice testimony and to testimony of those with prior criminal convictions, and I did call to the attention of the jury the fact that Yamata was an accomplice, that he had criminal records.

I know that I said also that he was an admitted perjurer; I think I may have done that at the request of one or more of the defendants. I told the jury that the testimony of

accomplices and of those with criminal convictions and of those who admitted perjury should be viewed with great caution and scrutinized carefully, so I certainly impressed it on the jury what they had to do in weighing Yamata's testimony.

Therefore, it seems to me despite able representations this afternoon, what he did before Judge Cooper, which seems not only fraudulent but foolish, but still, whatever it is, it seems to me to be cumulative on impeaching his credibility.

As I indicated, I have studied Mesarosh and certainly counsel for the defendants should have brought it to my attention. I do not think I knew the case before.

However, accepting the opinion of the Court, as I must, despite the three dissents, I must conclude that this is one of those instances to which the Court refers at 352 U.S. 9 where untruthful statements by a government witness subsequent to the trial are offered in support of a motion for a new trial as newly discovered evidence affecting his credibility at trial, and then, as I am sure you gentlemen have already read, the Court says, "such an allegation by the defense ordinarily will not support a motion for a new trial because new evidence which is merely cumulative for impeaching is not, according to the often repeated statement of the Courts, an adequate basis for the grant of a new trial."

Therefore, I feel obliged to deny these motions, and since my statement of my reasons have been made a part of the stenographic transcript, I will simply, in due course, endorse the motion papers: motion denied for reasons stated in open Court.

Thank you very much, gentlemen, for coming.

Appendix

Government Sentencing Memorandum

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Cr. 100

UNITED STATES OF AMERICA

—v.—

AKIYOSHI YAMADA,

Defendant.

The Government respectfully submits this memorandum to set forth the facts which would have been established at the trial of the defendant Akiyoshi Yamada and to bring to the attention of the Court certain information which we believe to bear upon the sentence to be imposed by the Court. Yamada has entered a plea of guilty to the conspiracy count and five substantive counts of the indictment charging him with knowingly submitting false and fraudulent letters to the Court in violation of Title 18, United States Code, Section 1001. It is our position that these crimes are matters of the utmost gravity which, in the factual context of this case require a stern response by the Court.

1. *Facts.*

In May of 1973, Akiyoshi Yamada entered guilty pleas to conspiracy charges in each of three separate fraud cases then pending against him in this District. The pleas were

entered under an agreement by which Yamada would make himself available to the Government as a witness concerning all matters in which he had in any way participated that he would cooperate completely with the Government in all such cases, would testify truthfully as necessary at any trial, grand jury, S.E.C. or other proceeding, and that he would refrain from any further criminal activity. In exchange for this promise of cooperation, the Government agreed not to proceed against Yamada in any other pending case or investigation involving him. The precise details of Yamada's possible criminal exposure are set forth in Appendix A hereto, a letter to the United States Attorney's Office from the S.E.C. attorney in charge of Yamada-related cases.

On June 26, 1973, Yamada appeared for sentence before the Honorable Irving Ben Cooper, who imposed a sentence of two years' imprisonment and a consecutive five-year term of probation on the three separate convictions and directed Yamada to surrender on or before August 1, 1973. We attach as Appendix B hereto the minutes of the Court's imposition of sentence.

The minutes of such sentence reveal the motive which prompted the commission of the crimes presently before the Court. In sentencing Yamada, Judge Cooper commented on the absence of any apparent charitable concern or activity in Yamada's record. He stated:

> "Yesterday I sentenced two human beings, brothers. No prior record, one a school teacher. They both collapsed when in connection with a financial enterprise they had launched, it began to get into difficulty, and in order to extricate themselves they conceived of some half baked notion which they thought would help them

out of their difficulties. What they did was an isolated instance or two.

As a fact finder—and I am pretty good at that—I had to declare that contrition had set in. It was deep; it was of a quality that was convincing to this Judge. They had shaken themselves up so badly that the torture which was inflicted over what had happened to them was the greatest punishment that could have possibly taken place. I am not prepared to say, by any means, that that is true here.

But there are assets that a Judge must consider. You pled guilty. Oh, I have been around long enough to know that in the long run you undoubtedly would have been found guilty. This is a resourceful governmental agency. But you did plead guilty. You have no prior record. *But there are not testimonials such as was present yesterday of moral deportment over a period of time that came to stand beside those who had to face sentence yesterday. You haven't got them. They are not here. I can't look to a Yamada who did things of quality, who lent aid to those who were suffering; who dedicated a period of his time to uplift the neglected, the tormented. Absent.* Everywhere I turn you are flayed. Every document I pick up denounces you. These valuable assets that come to a man in his hour of need are not here. They are moral, ethical values, that have a great deal to do with a Judge's concern as to what has happened to the human being sentenced." (T. 17-19) (Emphasis added.)

Immediately after the imposition of sentence, Yamada commenced the fraud which is the subject of the instant charge. Having never "lent aid to those who were suffer-

ing," he decided to concoct evidence of such charity in order to persuade Judge Cooper to reduce the two-year sentence imposed on June 25, 1973.*

In early July, 1973 he caused his attorney to file a Rule 35 motion before Judge Cooper.** Shortly thereafter, he commenced to manufacture letters purporting to detail a longstanding involvement in rehabilitating narcotics addicts. Through his secretary, Alida Bernstein, Yamada located one Paul Rogers, who was then employed in a Manhattan methadone clinic. Through Miss Bernstein, Yamada paid Rogers a sum of money (approximately $300) to fabricate two letters on stationery of the clinic describing Yamada's fictitious efforts to assist addicts to find employment, to stay away from narcotics, and so forth. The Government is in possession of the stenographic notes dictated by Yamada to Miss Bernstein which formed the basis for the letters, each of which is set forth in the indictment and reproduced herewith as Appendix C. We need hardly add that Yamada had never involved himself in any such charitable activity, nor had he ever met either of the purported signers of the two letters.

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* Only a technicality prevented this case from being prosecuted as a violation of Yamada's probation. At the conclusion of the June 26, 1973 minutes of sentence, the Court explicitly stated that the five-year term of probation imposed on Yamada with respect to one of the three conspiracy convictions was to run consecutively to the term of imprisonment. Thus, the crimes charged in the instant indictment, which were committed before Yamada's surrender, fell before the commencement of the probationary term. (T. 32)

** There is no evidence whatsoever that Yamada's counsel knew of his fraudulent scheme. To the contrary, the affidavits in support of the Rule 35 motion show that defense counsel was totally unaware of the fraudulent letters to Judge Cooper and of Yamada's false claim that he had long been involved in rehabilitating narcotics addicts.

The letters betray a deliberate effort to fabricate information which Yamada knew would commend themselves to Judge Cooper's attention. The first letter, for example, purportedly written by the physician-director of the clinic, states, "I find it inconceivable that a man who has devoted a tremendous amount of time over the past two years to interview our patients and help secure employment for many should be sentenced for violations which were committed before entering a new field of business and social outlook." Such language appears almost a direct response to an observation of the prosecutor at the time of sentence: ". . . having recently re-read your Honor's opinion in the Benjamin Haggett motion for reduction of sentence I know that your Honor is of the very strong opinion that it is as much the conduct of the defendant after the crimes have been committed as it is his conduct before which must be taken into account by a sentencing judge." (T. 7)

Yamada also composed the fictitious letter contained in Count Three. The purported "Flushing Center for Drug Counseling and Rehabilitation" did not exist, and Yamada caused fake stationery to be printed especially for the occasion, to lend an appearance of legitimacy to the letter. The address and telephone number appearing on such stationery are those of Yamada's then-chauffeur, a young, uneducated man named Gerald Williams. Williams has testified before the Grand Jury—and was prepared to testify at trial—that Yamada directed him to sign and send the letter as the "Community Director" of the non-existent drug agency.

With respect to the letter set forth in Count Four, Williams testified that Yamada had drafted the letter and given it to his chauffeur with instructions that he should have one of "his people" copy it in her own hand and that

he should forward the scrawled copy to Judge Cooper. Accordingly, Williams's wife, a woman of little education and of no real comprehension of what she was being asked to do, wrote the letter using Yamada's text, and Williams mailed it. The letter is designed quite clearly to convince Judge Cooper in the most dramatic terms that he had simply been unaware of Yamada's considerable charity toward the underprivileged.

The final letter set forth in the indictment was drafted jointly by Yamada and Edward Loughran, Jr., who, at that thime was a co-venturer with Yamada in an entertainment booking enterprise called Phoenix Entertainment Associates, Inc. Contrary to the implication contained in the letter—and to Yamada's representation to the Court at the time of his plea of guilty to this indictment—Phoenix was essentially a two-man operation run jointly by Yamada and Loughran and consisting of a secretary (Miss Bernstein) and a chauffeur (Mr. Williams). Attached to the letter was a bogus "copy" of a letter to Yamada's probation officer, a letter which was never received by the probation department. Both letters are included in Appendix C hereto. Both take pains to take the probation officer to task for failing to investigate Yamada's background. The Loughran letter, for example, states "Over the past few months I have made numerous telephone calls, was unable to reach [the probation officer] and never even got a message that he had returned a call. I find it strange that a probation officer would make no effort to contact a client's employer." The statement was a complete fabrication, designed to afford the Court a plausible explanation for a failure of the probation department to account for Yamada's newly-discovered charitable good works.

Appendix

In addition to the letters set forth in the indictment, the Government would have proven that Yamada solicited additional fake letters from Miss Bernstein and her finance which were shown to Yamada and then destroyed before being mailed. Finally, we would have offered Miss Bernstein's stenographic notes of a letter purportedly written by Loughran's father—who was at that time the Commissioner of Immigration of the Immigration and Naturalization Service—a letter which was dictated by Yamada but never sent.

2. *Yamada is entitled to no consideration whatsoever for any previous or future cooperation with the Government.*

We stress at the outset that, upon this sentence, Yamada is entitled to no consideration whatsoever for any previous or future cooperation with the Government. Such cooperation was the basis for limiting his substantial exposure to prosecution for other securities frauds and, as the sentencing minutes reveal, was taken into substantial consideration by Judge Cooper on June 26, 1973. Indeed, such cooperation was, in the eyes of the Court, virtually the only consideration which mitigated Yamada's record of almost unremitting fraud. (See Appendix B herein). Moreover, the very crimes which are the subject of the instant charges demonstrate that Yamada violated his agreement with the Government almost as soon as he had made it. Yamada was clearly advised that the commission of any further crimes would subject him to vigorous prosecution by the Government and would constitute a breach of the agreement. We are frank to advise the Court that we have considered prosecuting this defendant for his various unprosecuted frauds of which we have knowledge;

we have determined, however, that sufficient ambiguity exists as to whether Yamada understood that such consequences could flow from future criminal acts that we will not proceed on such cases. Nevertheless, it is clear that Yamada breached his agreement with the Government by committing the crimes presently before the Court. Moreover, the fraud perpetrated by Yamada has substantially vitiated his usefulness as a Government witness in any future prosecutions, thus rendering such cooperation far less significant than was anticipated by Judge Cooper at the time of the sentence imposed last year.* Finally, we submit that the fraud perpetrated by Yamada upon the Court represents the antithesis of cooperation or of genuine contrition for his past fraudulent activities.

3. *Yamada's fraudulent scheme was carefully contrived effort to obstruct justice.*

The fraud attempted by Yamada is characterized by his counsel as having ben motivated "out of pure fear" by a man "overcome by emotion." (Yamada's sentencing memorandum, p. 6). We respectfully submit that the fraud set forth above was anything but a frenzied, last-minute act of panic. It was a calculated, well-thought out plan to deceive the Court. As we have shown above, it was designed to appeal to those concerns uppermost in the

* Indeed, in the one trial where Yamada has testified as a Government witness, defendants have recently moved for a new trial on the sole basis that Yamada's testimony has been shown to be unreliable in light of the subsequently-committed crimes alleged in this indictment. While we do not believe that this claim has any merit—and while we have no evidence that Yamada perjured himself in that case,—the motion illustrates the sort of problems which we may readily anticipate in any future case in which Yamada testifies.

mind of Judge Cooper. Moreover, the letters are well-organized, contain every appearance of genuineness and, in short, were clearly carefully aimed at deceiving the Court.

Standing by itself, the fraud attempted in this case amounts quite clearly to a serious effort to obstruct justice by tampering with the Court's sacred obligation to impose sentence. Yamada's counsel appears to suggest the submission of the false letters amounted to the commission of little more than misdemeanor-type offenses (Sentencing Memorandum, p. 7). With respect, we urge that the offenses committed by this defendant strike at the very heart of the criminal justice system and must not be tolerated as mere misdemeanors. Every judge who wrestles with his conscience to impose a just sentence must rely almost exclusively upon information provided him by others. Such information is as essential to the sentencing process as testimony under oath is to any court proceeding. Abuse of this system, especially under the aggravated circumstances presented here, amounts to a serious obstruction of justice and should be punished as such.

4. *Yamada thoughtlessly drew innocent individuals into criminal activity.*

The extraordinary irony of the fraud set forth above is that this defendant, in asserting to Judge Cooper that he was reforming narcotics addicts, was actually drawing various individuals into the commission of serious crimes. Our interviews of Miss Bernstein, Mr. Williams and Mrs. Williams convince us that, although they knew that it was wrong to submit forgeries to the Court, they did so because Yamada had prevailed upon them to help him. Each of these individuals, to our knowledge, had no prior involve-

ment with the law, yet each could well have suffered totally unforeseen, serious consequences from such actions. Moreover, the physician whose name was forged to the first letter and the probation officer who was unjustly maligned in several of the letters were also victimized by the fraud. In short, Yamada rather thoughtlessly drew others into this matter at precisely the time when he was seeking to demonstrate to Judge Cooper that he possessed a special kind of thoughtfulness for others.

5. *In the context of Yamada's pose of contrition his fraud on the Court must be viewed as an act of extraordinary hypocrisy.*

In the context in which this case arises, the fraud committed by Yamada is especially serious. By pleading guilty and agreeing to testify as a Government witness to his manifold fraudulent activities, Yamada assumed a pose of contrition concerning such frauds which, it is now clear, was merely a device to reduce or, hopefully, eliminate imprisonment for such crimes.* In submitting the fraudulent letters to Judge Cooper, Yamada demonstrated convincingly that he fully expected to manipulate the Court, just as he had previously manipulated the victims of his finan-

* Prior to his sentence by Judge Cooper, Yamada stated to the Court: "Your Honor, after great reflection and introspection I have realized the harm, the devastating effect of my action during 1969, 1970 and 1971; the effect it has had on not only on myself but on my family, both here and in Japan, and I realized then, as I do now, that to make amends I would have to cooperate fully so that these matters can come to some resolution. It is in this spirit that I have devoted as much of my time as requested to the various Government agencies in the past and I intend to do so in the future." (Appendiv B, pp. 12-13) such statement must be viewed as an insincere expression of contrition and a cynical effort to parlay cooperation into a suspended sentence.

cial frauds. Moreover, the letters themselves betray a condescension and a cynicism exactly the opposite of the humane qualities which Yamada sought to present to the Court. In any defendant, such conduct is inexcusable. With respect to a defendant who holds himself out as a contrite cooperating witness, it is especially intolerable. In short, Yamada has demonstrated a cynical disregard for the administration of justice and an attitude that this Court is as vulnerable to deception as any victim of a securities fraud. Such an attitude must not be tolerated.

CONCLUSION

In writing the above, we are mindful of the fact that this Court is especially sensitive to the sentencing process as a focal point of the criminal justice system. The case before the Court presents a cynical abuse of such system by an individual pretending to make his peace with society. For all of the reasons set forth above, the cries to which Akiyoshi Yamada has pleaded guilty should be punished by a substantial term of imprisonment consecutive to the term which the defendant is presently serving.

Respectfully submitted,

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